In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1608

MAX GITMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1973 (Pet. App. A). The petition for a writ of certiorari was filed on May 31, 1973. The petition is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was subjected to double jeopardy by an indictment and trial in a federal court in Virginia after a judgment of conviction had been entered on a plea of *nolo contendere* to a federal indictment in Arizona based on separate fraudulent activities.

2. Whether the prosecution's failure to disclose Jencks Act material *prior* to trial requires reversal in the circumstances of this case.

3. Whether the investigation of petitioner's activities by three prior grand juries invalidated petitioner's indictment by a fourth grand jury.

4. Whether the use of evidence obtained without a warrant but with the consent of petitioner and his co-defendant violated petitioner's Fourth Amendment rights.

5. Whether the trial judge abused his discretion in denying petitioner's motion for a continuance to obtain new trial counsel after petitioner discharged his prior counsel.

STATEMENT

Following investigations by four grand juries in the Eastern District of Virginia, an indictment was returned by the grand jury at Norfolk, Virginia, in September 1971. The indictment charged petitioner with twenty substantive counts of mail fraud, in violation of 18 U.S.C. 1341 and 2, and two counts of conspiracy, in violation of 18 U.S.C. 371. Counts 19 and 21 were dismissed by the court. After a jury trial, petitioner was found guilty on the remaining twenty counts. He was sentenced to three years' imprisonment and a $5,000 fine on the conspiracy count (count 22) and one year's imprisonment and a fine of $1,000 on each of the other 19 mail fraud counts. The sentences on the latter counts were suspended, and petitioner was placed on probation for five years.

Petitioner and co-defendant Thomas Rosenfield[1] operated a debt consolidation service (Atlantic Associates,

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[1] Rosenfield was also convicted and sentenced to two years' imprisonment on one count of conspiracy and one year's imprisonment plus a fine of $200 on each of nineteen counts of mail fraud. All but 60 days of the jail sentence was suspended, and Rosenfield was placed on probation for three years.

Inc.) which had an office in Providence, Rhode Island (opened in 1962) and an office in Phoenix, Arizona (opened in late 1964 or early 1965). Each operation was independent of the other in that each had its own checking account, bookkeeping system, ledger cards, telephones, salesmen and office manager. The indictment in the present case dealt solely with the fraudulent operations of Atlantic Associates at Providence, Rhode Island (A. 6-23).[2]

The evidence showed that Atlantic Associates solicited customers by advertisements in various magazines requesting potential clients to send in for application forms on which to list monthly debts. On receipt of the application by Atlantic Associates at Providence, the company would send out a letter to the client, telling him to call a Mr. George Brent (a fictitious name) at Atlantic Associates in Providence. The client would then contact "George Brent," who could be any of several telephone salesmen, regarding the financial arrangement to be made (A. 84-90). Atlantic's general rule was to divide the client's total monthly debt by five in order to arrive at a weekly payment, which the client was to forward to the company in Providence, to take care of all the client's debts (A. 76). The company fraudulently diverted large sums of money through the retention of monies which should have been returned to the clients or paid to their respective creditors. The operation of Atlantic Associates, with specific reference to its fraudulent activities, is outlined in detail in Count 1 of the indictment (A. 6). Richard Goulden, a former office manager, testified that the company retained thousands

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[2] "A." refers to the Government's Appendix in the court below, a copy of which we are lodging with the Clerk.

of ledger cards reflecting individual accounts and did not disburse funds to the client's creditors. He also stated that petitioner instructed him to post fraudulent ledger cards by writing checks to creditors and thereafter placing the checks in a desk drawer rather than sending them out (A. 83-102).

ARGUMENT

1. In July of 1968, petitioner, along with two co-defendants, was indicted on fifteeen substantive counts of mail fraud in the United States District Court for the District of Arizona. That indictment (A. 28) related solely to alleged fraudulent operations of Atlantic Associates in Phoenix, Arizona. Each mailing count therein related only to correspondence to and from the Phoenix office occurring between July 1965 and March 1968.

In January of 1969, petitioner entered a plea of *nolo contendere* to Count 1 of the Phoenix indictment, referring to a mailing from Atlantic Associates, Inc., of 3312 North Central Avenue, Phoenix, Arizona, to a Lagene Armentrout of Baltimore, Maryland. Neither that mailing nor any other mailing mentioned in the Arizona indictment was mentioned in the Virginia indictment.

Petitioner claims that he pleaded *nolo contendere* to one count of the Phoenix indictment in reliance on "a firm assurance" of two Assistant United States Attorneys in Arizona that no further criminal prosecutions would be instituted against him arising out of the activities of Atlantic Associates (Pet. 6). This claimed promise of immunity in Phoenix was repudiated by petitioner's former Phoenix attorney (A. 47-59) and by a former Assistant United States Attorney from Phoenix (A. 53-55) in a hearing on the subject in the district court.

Petitioner also contends that he was protected from prosecution in Virginia by the principle of collateral estoppel embodied in the Fifth Amendment (Pet. 7). But the principle of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson,* 397 U.S. 436, 443.[3] In this case, the issue was whether petitioner was guilty of mail fraud and conspiracy in the operations of the Providence, Rhode Island office of Atlantic Associates. That issue had not been previously litigated. As we noted in the Statement, *supra,* each of the two offices had its own checking account, bookkeeping system, ledger cards, telephone number, salesmen and office manager. The Arizona indictment did not mention Atlantic's operations in Providence, and the Virginia indictment did not mention the operations in Phoenix.

Moreover, since each mailing in violation of 18 U.S.C. 1341 is a separate offense (*Badders* v. *United States,* 240 U.S. 391; *United States* v. *Williams,* 424 F. 2d 344 (C.A. 5), certiorari denied, 405 U.S. 954), the fact that the mailings charged in the Virginia indictment were different from those charged in the Arizona indictment is dispositive of petitioner's claim.

2. Petitioner contends (Pet. 8) that the government's failure to turn over to defense counsel before the day

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[3] In *Ashe,* the defendant was entitled to invoke principles of collateral estoppel at his second trial because of the facts that had been determined by his acquittal at the first trial. The concept of collateral estoppel is of no aid to petitioner here, however, where his Arizona trial resulted in a judgment of conviction. Petitioner thus must instead be relying on principles of double jeopardy, but they do not aid him either because of the difference in the offenses involved in the two cases.

of trial a statement of a former employee of Atlantic Associates repudiating his non-inculpatory grand jury testimony, which had been turned over to defense counsel, requires reversal.

The day before trial, defense counsel were given, among other things, the grand jury testimony of Mr. Elliot Chavoor, a former office manager of Atlantic Associates. In that testimony Mr. Chavoor indicated that he received little or no operational instructions from petitioner or co-defendant Rosenfield. At the beginning of Mr. Chavoor's trial testimony, the government turned over to defense counsel an affidavit of Chavoor repudiating his grand jury testimony and containing inculpatory statements regarding petitioner and Rosenfield.

The government's conduct here was not "deceptive" nor did it fail to comply with applicable statutes, as petitioner contends. Under the Jenks Act (18 U.S.C. 3500(b)), the government is not required to make available to the defense inculpatory statements of government witnesses until *after* the witness has testified. Here, various materials were turned over to the defense before the trial in order to expedite the trial, but this was accompanied by a written statement indicating that not all Jencks Act material was being turned over in advance (A. 42-43, 45, 128). The prosecution thus more than complied with the requirement of the Jencks Act.[4]

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[4] *Brady* v. *Maryland*, 373 U.S. 83, on which petitioner relies, is inapplicable. *Brady* enunciated the principle that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment" (373 U.S. at 87). Here, there was complete disclosure of Chavoor's statement. See *United States* v. *Trainer*, 423 F. 2d 263 (C.A. 1).

The district court, in denyig petitioner's motion for a mistrial, specifically found that the government had no intention of misleading the defense (A. 127-129) and that petitioner could have kept Chavoor for another day of testimony if he so desired (A. 129).

3. Petitioner's claim that the government improperly used four grand juries as "practice arenas * * * to test the effectiveness of its presentation" (Pet. 8) is unfounded. The operations of Atlantic Associates were investigated by the four grand juries of the Eastern District of Virginia (meeting, on a rotating basis, in Alexandria, Richmond, Newport News and Norkfolk) in March, May, June and September of 1971. The government was entitled to present the matter to each of these grand juries.

Petitioner does not attack the sufficiency of the indictment or the evidence upon which it is based. Nor does he question the duty of a grand jury, often recognized by this Court, to investigate possible criminal violations. See *United States* v. *Dionisio*, 410 U.S. 1, 12-13; *Branzburg* v. *Hayes*, 408 U.S. 665, 687-688; *United States* v. *United States District Court*, 238 F. 2d 713, 719, 721 (C.A. 4). Even if adverse action had been taken by the three other grand juries before the Norfolk indictment, the government would have had a right to present its case to the Norfolk grand jury. *United States* v. *Thompson*, 251 U.S. 407, 413; see also *United States* v. *United States District Court, supra*, 238 F. 2d at 722; *United States* v. *Gross*, 416 F. 2d 1205, 1210 (C.A. 8), certiorari denied, 397 U.S. 1013, and cases there cited.

4. Petitioner contends that his Fourth Amendment right of privacy was violated (Pet. 9-10), apparently by the the investigation and use in evidence of business records of Atlantic Associates obtained by postal inspec-

tor Earl Crossman. Inspector Crossman made three trips to Providence to review those records. The first visit was at the invitation of co-defendant Rosenfield (A. 146), and the other two were pursuant to a valid subpoena *duces tecum* issued by the Norfolk grand jury (A. 145). The last two visits were necessary as part of a government effort to ease a potential burden on petitioner by attempting to select certain records rather than put petitioner to the expense and inconvenience of shipping all his corporate records to Virginia. Inspector Crossman testified that petitioner was present at the last two visits and made no objections (A. 143-146).

No motion was ever made to quash the subpoena or to suppress the records, nor does petitioner challenge the grand jury's power to issue the subpoena (see, *e.g.*, *United States* v. *United States District Court*, *supra*, 238 F. 2d at 719, 723; *United States* v. *Gurule*, 437 F. 2d 239, 241 (C.A. 10), certiorari denied, 403 U.S. 904). Clearly, on the facts of this case, there was no invasion of petitioner's privacy which would warrant review by this Court.

5. Finally, petitioner contends that the denial of his motion for a continuance, filed five days prior to trial, "was an abuse of discretion of constitutional proportion" (Pet. 11). That motion was based on notification to petitioner, shortly before trial, that Mr. F. Lee Bailey was unable personally to represent petitioner at trial, but that instead Mr. Bailey's associates, Messrs. Goodman and Alch, were to try the case. Petitioner was unwilling to proceed on that basis. A hearing was held on the continuance motion (A. 60-64), which disclosed that Messrs. Goodman and Alch had handled all pre-trial matters and that petitioner had not spoken to Mr.

Bailey since the day he retained Mr. Bailey's firm as counsel (A. 62). Mr. Alch sent a letter to District Judge Hoffman, after he was discharged by petitioner, advising that he was "ready, willing, and able to go forward with the trial on the designated date * * *" (A. 65-68). On the basis of that letter, District Judge Kellam denied the motion, and the matter went to trial with both Mr. Alch and Mr. Goodman present. In these circumstances, the trial court's denial of petitioner's motion for a continuance did not constitute an abuse of discretion. See, *e.g.*, *Giacalone* v. *Lucas*, 445 F. 2d 1238 (C.A. 6), certiorari denied, 405 U.S. 922. Indeed, petitioner did not then, nor does he now, indicate that he was in any way prejudiced by the district court's ruling.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1973.

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[5] Petitioner makes no claim that the assistance of these two attorneys, who were thoroughly familiar with the case and had handled all pretrial proceedings, was ineffective.